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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

EDWARD WALTHER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOEL KAPLAN, ESQUIRE
Attorney for Petitioner
28 West Flagler Street
Suite 400
Miami, Florida 33130

QUESTIONS PRESENTED FOR REVIEW

WHETHER ONCE A CRIMINAL DEFENDANT CHOOSES TO EXERCISE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL CAN HE EVER BE PENALIZED IN ANY FASHION FOR DOING SO AND IF HE IS, MUST HIS CONVICTION BE REVERSED?

WHETHER ONCE A JURY ASKS TO THE TRIAL JUDGE FOR GUIDANCE IN UNDERSTANDING SO CRITICAL AN ISSUE AS THE BURDENS OF PROOF IMPOSED UPON THE PROSECUTION AND THE DEFENSE BY AN ENTRAPMENT DEFENSE, DOES THE COURT, BY REFERRING THE JURY TO THE INSTRUCTION WHICH CONFUSED IT IN THE FIRST PLACE FOR THE ANSWER TO THE QUESTION, DENY THE DEFENDANT THE PROCESS HE IS DUE UNDER THE FIFTH AMENDMENT?

LIST OF INTERESTED PERSONS

The persons having an interest in the outcome of this case are the Petitioner, his family, the United States Attorney for the Middle District of Florida, the United States District Court for the Middle District of Florida and

all the judges of the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Edward Walther, hereby asks that a writ of certiorari issue to review the judgment, the opinion, and the order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in Case No. 87-3631 on

March 16, 1989, and on May 16, 1989, which affirmed the judgment of convictions and the sentences imposed upon him by the United States District Court of the Middle District of Florida.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming Petitioner's convictions and sentences is reported in United States v. Walther, 867 F.2d 1334 (11th Cir. 1989), rehearing denied, ___ F.2d ___ (11th Cir. 1989). The decision is reproduced in the Appendix, hereinafter "A.___." A timely Petition for Rehearing and Rehearing En Banc was filed and denied by order of the Eleventh Circuit entered on May 21, 1989. See A.54.

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C., Section 1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's order on rehearing. See Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be...deprived of life, liberty, or property, without due process of law...

United State Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of counsel for his defence.

STATEMENT OF THE CASE

Petitioner, EDWARD WALTHER, was the

appellant in the United States Court of Appeals for the Eleventh Circuit and the defendant in the United States District Court for the Middle District of Florida. The respondent, UNITED STATES OF AMERICA, was the appellee in the United States Court of Appeals for the Eleventh Circuit and the prosecution in the United States District Court for the Middle District of Florida. In this petition, Petitioner will be referred to by name. The respondent will be referred to as the government. The record references in this petition are to the Record-on-Appeal which was used by the United States Court of Appeals for the Eleventh Circuit and which is now in the possession of the Clerk of the Court for the United States District Court for the Middle District of Florida. The 27

volumes of the Record-on-Appeal will be designated by the letter "R", followed by the volume number.

A federal grand jury indicted WALTHER and his three co-defendants for attempting to possess with intent to distribute marijuana in violation of Title 21, U.S.C., Sections 841(a)(1) and 846 (Count I) and for conspiring to possess with intent to distribute marijuana in violation of Title 21, U.S.C., Section 846 (Count II). These offenses resulted from a "reverse sting" operation in which law enforcement officers, posing as marijuana purveyors, endeavored to sell their merchandise to WALTHER and his co-defendants. 867 F.2d at 1335. WALTHER'S defense to these charges was entrapment. 867 F.2d at 1338. The officers' efforts and the

defendants' activites were captured on videotape which was presented at trial. 867 F.2d at 1343.

After arraigning WALTHER on these charges, a United States Magistrate entered a "Report and Order on Omnibus hearing Project - Instructions" in which it granted a defense request for discovery pursuant to Rule 16, Federal Rules of Criminal Procedure. R.1-23. In particular, the magistrate directed the government to provide to the defense all documents and tangible objects contemplated by Rule 16(a)(1)(C). R.1-23. In the Eleventh Circuit, tape recordings are discoverable under Rule 16. United States vs. Barragon, 793 F.2d 125, 1259 (11th Cir. 1986). This rule has been in effect in that Circuit for quite some time. Davis vs. United

States, 413 F.2d 1226 (5th Cir. 1969); United States vs. James, 495 F.2d 434, 435-6 (5th Cir. 1974) ("There is no question that under this Circuit's interpretation of Rule 16(a)(1) [the defendant] was entitled to discovery of the tapes.")

Despite the magistrate's order and the commands of Rule 16 the government resisted turning over to defense counsel copies of the videotapes made of the crime in question. R.1-53. The government refused to provide the videotapes specifically to protect "the identity and safety of the various law enforcement personnel who appear in such [videotapes]." See letter of February 13, 1987, sent by the government to counsel for one of the co-defendants which was attached to a pleading filed by

the government which it styled "Government's Response to Defendant Woodruff's Motion for Disclosure of Electronic or Other Surveillance." R.1-53. In fact, the government, misrepresented this concern because, as it was brought out during trial, the videotapes were staged so as to keep the faces of the law enforcement officers out of the camera's view. Subsequently, the magistrate approved the procedure requested by the government for handling the discovery of the videotapes--making them available for viewing only at the office of the Drug Enforcement Administration. R.1-72, 73. Hence, copies of the videotapes were <u>never</u> disseminated to defense counsel or their clients. Thus, the Eleventh Circuit's conclusion that the district court did

not err in allowing the government witnesses to explain "why multiple copies of the videotapes were not distributed to the appellants' counsel" really misunderstood what occurred. 867 F.2d at 1344.

The trial of this case began on May 4, 1987. R.11. During the testimony of its first witness, Joseph Davila the officer most active in trying to get the defendants to buy the marijuana, the government asked him about any special precautions or instructions given the confidential informant, who introduced the sellers (the police) to the buyers (the defendants) R.12-117-8, as to how he should act at the first meeting between the parties. R.12-124-5. Although an objection to the question was sustained, the witness answered that "Bill, the

confidential informant, was given instructions by my supervisor not to stand in certain areas of the office so he wouldn't be captured on film." R.12-125. When the question was rephrased, it brought an objection on relevancy grounds, amongst others. R.12-125. This objection was overruled, R.12-125, and the witness answered that...

> ...[M]y understanding was he was to sit away from the camera and given a location inside the office where he could safely sit and not be captured on film. R.12-126.

This question was followed by the following questions and answers:

> Q. Why was it important from your personal law enforcement experience that he not be captured on film?
>
> A. The reason being the tapes would eventually be turned over to the defendants and the film can be duplicated in some way and then the pictures can be circulated among the drug

traffickers anywhere in the State of Florida.

Q. And from your years of professional law enforcement experience, do you know personally or from your professional experience of that occurring in other instances?

A. Yes, many times. R.12-126.

The prosecutor thereafter turned his attention to other areas. However, the best was yet to come.

On cross-examination, defense counsel quite correctly inquired into this matter under Rule 611(b), Federal Rules of Evidence. The inquiry began with general questions about the purpose of using a video camera to capture what occurred in the instant case. R.14-76. The inquiry confirmed that the camera had been set up and that the undercover officers had been instructed to avoid the camera's eye. R.14-77-8. This quite

limited inquiry was followed on redirect by a highly prejudicial and unethical inquiry by the prosecutor. Over objection the government was permitted to put before the jury the following:

> Q. You were asked why the face of the undercover--I beg your pardon--why the face of the confidential informant is best not to appear on a videotape piece of evidence. Would you tell the jury why that is so, based on your years of professional experience.
>
> Mr. Edmund: Well, I would object, Your Honor. He was asked that. He must have missed it.
>
> The Court: Say again?
>
> Mr. Edmund: Repetition. If he was asked the question, he obviously answered it.
>
> The Court: No, I'll overrule the objection.
>
> By Mr. Schmidt (the prosecutor):
>
> Q. You may answer the question, Detective Davila.
>
> A. The reason we do not present either confidential informant or

undercover people on film is because the film is turned over eventually to defense attorneys and we don't want copies floating around because it's going to present a danger to the informant as well as the undercover officers involved.

Q. From your professional experience and from your training, have you known in which instances in which such a danger has been presented?

Mr. Toward: Your Honor, I'm going to object.

The Court: Yeah. I think that's irrelevant here, given his last answer, Mr. Schmidt.

Mr. Toward: Thank you, Your Honor.

The Court: The relevance of that is exhausted.

By Mr. Schmidt:

Q. In connection with your work in Polk County, Detective Davila, have you or agents working with you ever had a concern for the security of a confidential informant?

A. Yes.

Q. Could you describe one--any--

one particular incident that you are personally aware of.

Mr. Toward: Your Honor, I'm going to object.

Mr. Alcott: Objection--

The Court: What's the relevance of that, Mr. Schmidt?

Mr. Schmidt: I believe, Your Honor, that his inquiry was raised in the cross-examination of the witness, Your Honor, on a number of instances by both Mr. Alcott, Mr. McDaniel, and Mr. Edmund. And I think it's perfectly fair redirect examination.

The Court: I'll sustain the objection. I think the relevance is exhausted. His last answer is before the jury.

Mr. Toward: Thank you, Your Honor.

By Mr. Schmidt:

Q. Do you know why your--do you know why in this instance the government has refused to disclose the identity of Bill?

Mr. Edmund: Your Honor, I object on grounds it's leading, grounds it's not material, just a matter of fact.

The Court: Well, I'll overrule that objection, given cross-examination, one question that was asked of him concerning the subject.

By Mr. Schmidt:

Q. You may answer the question.

A. Would you repeat the question, please.

Q. Certainly.
Do you know why the government in this instance has refused to disclose the identity of the confidential informant Bill?

A. Number one, for his own protection and also I believe he's also involved in other cases with the Drug Enforcement Administration.

Q. Do you believe the protection of his family also is something considered by your officers?

A. Yes sir. R.14-173.

Thus, the clear insinuation that not only WALTHER and his co-defendants; but also their attorneys, posed a threat to the safety of the confidential informant,

notwithstanding the absence of any proof to substantiate this claim whatsoever, was presented to the jury for its consumption. Thus, even though the government knew (or should have known) that defense counsel was required to secure and review the videotapes (discoverable evidence), the government injected something sinister in their doing so. More amazingly, the government proceeded to do so knowing full well that the videotapes were never provided to (as opposed to shown) to defense counsel. Even more astonishingly, it did not stop there.

During recross-examination, the defense established that the witness did not even know if the confidential informant had a family. This answer showed the recklessness of his answers, a

recklessness no doubt born of his desire to prejudice the defendants in anyway, shape and/or form he could. Then on re-redirect examination, the government elicited the following, again over objection by the defense:

> Q. You were asked, Detective Davila, in your recross-examination, asked whether the defendants had been furnished with copies of the videotapes in this case. Do you know the basis for which there was a concern about furnishing those tapes?
>
> A. Because there were--undercover officers are seen on the tapes, and to protect them we controlled the issuance of the tapes.
>
> Q. Do you know, Detective Davila, based on your own personal information, whether you made audio versions of the cassettes--audio cassettes of the videotape versions that were given to defense counsel in this case?
>
> Mr. Edmund: I beg your pardon? We're talking about video, if it please, Your Honor. I object on grounds it's not

material and irrelevant about the audio.

The Court: I'll overrule the objection to the last question.

The Witness: Would you mind repeating it.

By Mr. Schmidt:

Q. Certainly, Detective Davila. Do you know personally whether copies of the audio track or audio portion of the videotape evidence were duplicated and turned over to defense counsel in this case?

A. Yes. There was a copy available for them at the Drug Enforcement Administration office here in Tampa for their viewing purposes.

Q. With respect to the concern you mentioned in connection with my previous question, what was the basis for Polk County's concern?

Mr. Edmund: I object on grounds I don't understand.

The Court: About what, mister--I don't understand the question either.

Mr. Schmidt: Let me

rephrase the question, Your Honor.

By Mr. Schmidt:

Q. You mentioned a concern, Detective Davila, of having the pictures of the undercover officers readily available. Why?

A. Again, to protect the identity of the undercover officers which are seen on the tapes.

Q. And why would it be important to protect their identity?

A. For their own safety and the safety of their families. R.14-185-7.

However, the government was not through.

During the testimony of its second witness, Warnock, the prosecutor struck again. During cross-examination, Warnock was questioned about the fact that some of the conversations between parties, the buyers (the defendants) and the sellers (the police), had not been tape recorded:

Q. (by defense counsel) Mr. Schmidt or Mr. Jackowski or any

of these gentlemen to my left, these four men, tell you to answer the question about the reason no tapes were made on occasion was for protection?

A. They never told me--told me anything. They asked me to explain my report and things like that.

Q. Did you tell them that?

A. Did I tell them what?

Q. Did you tell them that the reason no tapes were made on different occasions was for protection?

A. Protection of the informants?

Q. The informants or the officers.

A. I may have told them that. That's what we did--repeat that. You got me--

Q. Let me back up then. Did they tell you anything about what Mr. Davila testified to yesterday?

A. No. R.15-81-2.

On redirect, the government, obviously not inclined to miss an opportunity to

create prejudice against the defendants, engaged in the following questioning and received the following answers from Warnock:

> Q. Are you aware that any tape recordings of telephone conversations between a confidential informant and anyone who is a suspect or a defendant must be turned over to the defendants before the trial of a criminal case?
>
> A. Yes.
>
> Q. Are you aware that any such recordings could be used by a criminal defendant or others to help identify and locate a confidential informant?
>
> A. Yes.
>
> Q. Are you aware of why one would want to protect the confidentiality and secrecy nd identity of the confidential informant?
>
> A. Yes, sir. It's for his safety. It's for his safety.
>
> Q. And what is the basis for your understanding on that?
>
> A. Informants, they walk a thin

> line. I can tell you that right now. You know, we had one killed last year in Polk County; I know that. They walk a thin line. You get money, you get drugs together, you've got--you've got danger. I promise you that. R.15-130-1.

On appeal, the Eleventh Circuit approved the government's conduct. 867 F.2d at 1344.

On May 26, 1987, after fourteen days of testimony, the district court instructed the jury. R.26. At WALTHER'S request, the court used Special Instruction No. 9 contained in Pattern Jury Instructions, United States Eleventh Circuit District Judges Association (1985), to advise the jury on the defense of entrapment. R.24-135-6. A copy of the instruction given is reproduced at A.55. Parenthetically, it should be noted that during the charge conference held in the instant case, the government

never voiced any objection to the giving of this instruction. R.23-79-89.

After approximately two hours of deliberations on May 26, 1987 and an hour of deliberations on May 27, 1987, the jury sent the trial court a note in which it clearly stated that it had been confused rather than enlightened by the entrapment instruction the district court had given. The jury requested further guidance and instruction from the district court when it asked upon whom the burden of proof of entrapment rested, the defense or the prosecution. R.25-3. Although the defense requested that the district court answer the question directly, the district court, over appropriate objection chose to refer the jury back to the very same instruction which had precipitated the need for the

question. R.25-6-7. A review of the instruction used reveals that it does not speak to the burdens of proof. Guilty verdicts against WALTHER on both counts in the indictment were returned approximately an hour later. R.25-8. On appeal, the Eleventh Circuit held that because the original instruction given was correct and had not been objected to, the district court did not abuse its discretion by referring the jury to it for guidance in answering its question and clearing up its confusion, notwithstanding the fact the instruction generated the confusion in the first place. 867 F.2d at 1341.

On August 12, 1987, the district court sentenced WALTHER to serve concurrently two ten-year terms of incarceration. R.4-137. On August 19,

1987, WALTHER timely instituted his appeal. R.1-142. On March 16, 1989, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit rejected these claims of error raised by WALTHER in his direct appeal. On May 16, 1989, the United States Court of Appeals for the Eleventh Circuit refused to consider these matters en banc. It is from these decisions that certorari review is sought.

REASONS FOR GRANTING THE WRIT.

I.

ONCE A CRIMINAL DEFENDANT CHOOSES TO EXERCISE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL HE NEVER CAN BE PENALIZED IN ANY FASHION FOR DOING SO AND IF HE IS, HIS CONVICTION MUST BE REVERSED.

As long ago as 1965, this Court held, within the context of the Fifth Amendment, that a criminal defendant may

not be penalized for exercising a constitutional right because to do so "cuts down on the privilege by making its assertion costly." Griffin vs. State of California, 380 U.S. 609, 614 (1965). Ten years later, in 1975, this Court again held that evidence a criminal defendant exercised his right to remain silent after being advised he possessed this right was irrelevant and its admission constituted reversal error. United States vs. Hale, 422 U.S. 171 (1975).

> We now conclude that the respondent's silence during police interrogation lacks significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact. 422 U.S. 180-1.

One year later, this Court held that it was "fundamentally unfair and a

deprivation of due process" to exact a penalty for a defendant's exercise of a constitutional right, in this case his Fifth Amendment right to remain silent, after the defendant had been advised he possessed this right and he could exercise it. Doyle vs. Ohio, 426 U.S. 610 (1976).

> ...while it is true that Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. 426 U.S. at 618.

Very recently, this Court affirmed the prohibition against exacting a price for the exercise of a constitutional right. Wainwright vs. Greenfield, ___ U.S. ___, 106 S.Ct. 634, 639 (1986). ("The point

of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony.") See: Garrity vs. New Jersey, 385 U.S. 493 (1967) ("There are rights of contitutional stature whose exercise a State may not condition by the exaction of a price.") See also: Brooks vs. Kemp, 762 F.2d 1383, 1411 (11th Cir. 1985) (en banc). ("It is improper to urge that a criminal defendant's exercise of constitutional rights is a ground for discrediting his defense.") Hence, if WALTHER's counsel's review of the videotapes constituted the exercise of a fundamental right WALTHER was guaranteed, WALTHER should not have had to pay any

price for doing so and if he did, the Eleventh Circuit's affirmance of what occurred cannot stand.

The Sixth Amendment guarantees to a criminal defendant the assistance of counsel. This right is "a fundamental component of our criminal justice system" and "[l]awyers in criminal cases 'are necessities, not luxuries'." United States vs. Cronic, 466 U.S. 648, 653 (1984) (emphasis added). Furthermore, the accused must be afforded effective assistance of counsel. McMann vs. Richardson, 397 U.S. 759, 771 (1970). See also: Cuyler vs. Sullivan, 446 U.S. 335, 344 (1980) ("The right to counsel prevents the States from conducting trial at which persons who face incarceration must defend themselves without adequate legal assistance.")

As the Sixth Amendment imposes an obligation on defense counsel to be the prosecutor's adversary, rather than a friend of the Court, when he represents his client, United States vs. Cronic, 466 U.S. at 656, ftnt. 17, it is obvious that defense counsel must learn all he or she can about the facts and circumstances underlying the charges against his or her client. The Eleventh Circuit has recognized as much and has expressly imposed this obligation upon counsel for a criminal defendant. See: United States vs.Johnson, 615 F.2d 1125, 1128 (5th Cir. 1980)("It is a duty of a court-appointed counsel to interview potential witnesses and to make an independent examination of the factual circumstances, pleadings and law involved."); Rummel vs. Estelle, 590

F.2d 103, 104 (5th Cir. 1979) ("[I]nvestigation and preparation are the keys to effective representation."); Caraway vs. Beto, 421 F.2d 636, 637 (5th Cir. 1970) ("Certainly, an attorney cannot render reasonably effective assistance unless he has acquainted himself with the law and the facts of the case."). As a result, it really cannot be disputed that defense counsel must review discoverable evidence if he or she is to vindicate his or her client's constitutional right to effective assistance of counsel, especially in light of the Eleventh Circuit's own holdings that the failure of defense counsel to investigate the facts underlying the case against his client is "unconscionable" and falls below the level of performance required by the

Sixth Amendment. House vs. Balkcom, 725 F.2d 608, 617 (11th Cir. 1984). See also: Code vs. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986). Indeed, the Eleventh Circuit has expressly held that the failure of defense counsel to avail himself of discovery procedures during his investigation of his client's case constitutes ineffective assistance of counsel. Alrich vs. Wainwright, 77 F.2d 630 (11th Cir. 1985). Plain and simply, WALTHER was entitled to and his counsel was duty-bound to review the vidotapes made of the crime in question.

WALTHER's counsel's review of the videotapes, by itself, cannot be deemed unethical or illegal; accordingly, the government's suggestion it was contravenes United States vs. McDonald, 620 F.2d 559, 564 (5th Cir. 1980) in

which defense counsel was disparaged for doing his job, ethically assisting his client, the defendant, by the prosecutor in the jury's presence without any basis for the attack.

> The comments were likely to give rise, in the average juror's mind, to at least three inferences: (1) [the defendant's] attorney acted illegally or unethically, (2) defense counsel generally in criminal cases act illegally or unethically, and (3) [the defendant] would not have gotten a lawyer unless he was guilty...No prosecutor, however, may impugn the integrity of a particular lawyer or that of lawyers in general, without basis in fact, as means of imputing guilt to a defendant. It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel. 620 F.2d at 564.

WALTHER's act in exercising his right to counsel simply was not probative of any issue regarding guilt or innocence, Bruno vs. Rushen, 721 F.2d 1193 (9th Cir.

1983), and he should not have been penalized for his exercising of this right. Yet the government sought to do so, was allowed to succeed and, more amazingly, the Eleventh Circuit approved its conduct. Given the fundamental nature of the right involved, its importance to the adversial process, the unfairness of extracting a price for exercising the right and the frequency of the problem (it has happened before and the Eleventh Circuit has invited the government to do it again), this issue poses a question of great practical and doctrinal importance and merits review on certiorari within the meaning of Supreme Court Rule 17 for two reasons.

First, what the government did in the instant case was unethical within the meaning of this Court's all too often

cited decision in Burger vs. United States, 295 U.S. 78 (1939). In the instant case, the prosecutor let his overwhelming urge to win the case at all costs eclipse his duty to refrain from engaging in improper methods calculated to produce a conviction at any cost. At the outset, his representations about the purported dissemination of the videotapes of the crime in question to defense counsel were duplicitous because he had managed pre-trial to avoid having to provide defense counsel with copies of the videotapes. There was therefore no threat of what he insinuated would occur actually occurring.

Second, despite having no basis in fact, he also managed to suggest to the jury that not only were the defendants violent individuals who would do harm to

law enforcement personnel, but also that their attorneys were unethical and were engaged in illegal conduct with their clients. This insinuation made the attorney-client relationship and the exercise of the Sixth Amendment right to assistance of counsel into something sinister. The suggestion was particularly improper inasmuch as this Court's decisions and decisions from the Eleventh Circuit imposed upon defense counsel the absolute duty to review discoverable matters, including the videotapes in the instant case. As such, it was not a matter appropriate for discussion before the jury, especially since it was irrelevant to any conceivable issue in the lawsuit tried before the district court.

The prosecution's misconduct

constituted a price (his right to a fair trial) WALTHER had to pay for exercising his right to effective assistance of counsel. (Perhaps, if WALTHER had not retained counsel the government may possibly have felt precluded from disparaging defense counsel like it did.) This Court's prior decisions prohibiting the exaction for this price. Yet, the Eleventh Circuit ignored these precedents and approved what the prosecution did. Since it approved what it did in a published opinion, we can expect the type of conduct the prosecution engaged in in the instant case to recur in varying settings under the guise of explaining why the government did or did not do something in connection with an item of evidence or a particular witness. As United States vs.

McDonald, supra, and Bruno vs. Rushen, supra illustrate, this type of conduct is not unknown in the federal court. Rather than being approved, it should be disdained and the Eleventh Circuit's contrary decision must be reviewed. Otherwise, criminal defendants like WALTHER, Bruno and McDonald will continue to be punished for exercising fundamental constitutional rights contrary to the concept of fundamental fairness and the case law.

II.

ONCE A JURY ASKS THE TRIAL COURT FOR GUIDANCE IN UNDERTANDING SO CRITICAL AN ISSUE AS THE BURDENS OF PROOF IMPOSED UPON THE PROSECUTION AND THE DEFENSE BY AN ENTRAPMENT DEFENSE, THE TRIAL COURT, BY REFERRING THE JURY TO THE INSTRUCTION WHICH CONFUSED IT IN THE FIRST PLACE FOR THE ANSWER TO ITS QUESTION, DENIES THE DEFENDANT THE PROCESS HE IS DUE UNDER THE FIFTH AMENDMENT.

In the federal judicial system, the burden of giving proper instructions to the jury falls exclusively on the trial judge. Bollenbach vs. United States, 326 U.S. 607 (1946). Explaining the elements of the offense(s) for which the defendant is being tried is solely the trial court's responsibility. United States vs. Gibbs, 594 F. 2d 125, 127 (5th Cir. 1979). To discharge this burden, the trial judge must give instructions which are clear, accurate, complete and comprehensible. United States vs. Clark, 475 F. 2d 240 (2nd Cir. 1973). Correct and comprehensible instructions insure that a jury's verdict is returned in accordance with the constitutional underpinnings of our system of justice.

> If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be

> clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt. 475 F. 2d at 248.

Not surprisingly, instructions which confuse, mislead or create an erroneous impression in the minds of the jurors concerning the law applicable to the issues it must decide have been characterized by various federal appellate courts as "reversible error," United States vs. Stephensen, 569 F. 2d 1372 (5th Cir. 1979), "plain error," United States vs. Clark, supra, "grave error," United States vs. Hiscott, 586 F. 2d 1271 (8th Cir. 1978), and "fundamental error," United States vs. Pope, 561 F.2d 663 (6th Cir. 1977).

Undoubtedly, the stringent standards enunciated in the above cases stem from

the perception, like the one made by this Court, that...

> ...[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Carter vs. Kentucky, 450 U.S. 288, 302 (1981).

Accordingly, if a defendant is entitled to an instruction as to any recognized offense for which there exist evidence sufficient for a reasonable jury to find in his favor, Mathews vs. United States, ___ U.S. ___, 108 S.Ct. 883, 887 (1988), it follows that the jury must be given a complete and clear instruction on the defense. In this vein, numerous federal circuits require the district court to instruct the jury on the burden of proof imposed by an entrapment defense. United States vs. Dearmore, 672 F.2d 738, 741 (9th Cir. 1982) ("An entrapment charge must clearly instruct the jury the

Government must prove beyond a reasonable doubt that the defendant was ready and willing to commit the crimes whenever an opportunity was afforded.") United States vs. El-Gawli, 837 F.2d 142 (3rd Cir. 1988). United States vs. Wolffs, 594 F.2d 77 (5th Cir. 1979).

> The language of an entrapment instruction must unmistakably apprise the jury that the burden is upon the govnerment to prove beyond a reasonable doubt that, before anything at all occurred respecting the alleged offense for which the defendant is being prosecuted, the defendant was ready and willing to commit such crimes whenever an opportunity was afforded, and that government agents did no more than offer the opportunity. The instruction also must be unmistakably clear in informing the jury that if the evidence in the case leaves a reasonable doubt as to whether defendant had the predisposition to commit an offense of the character charged, apart from the government inducement or persuasion, the defendant must be found not guilty. 594 F.2d at 83 (emphasis added).

Indeed, the most recent pattern jury instruction on entrapment formulated by the Federal Judicial Center includes an instruction on the burden of proof the jury sought in the instant case and the district court, over WALTHER's objection, refused to give. See Instruction No. 54, Federal Judicial Center, Pattern Criminal Jury Instructions (1988), reproduced herein at A.57-58.

Furthermore, in the instant case, when the jury asked for this very instruction (obviously because what it had heard in the original instruction did not cover or did not clarify the issue of who bore what proof under an entrapment defense), the district court was required to give an answer (beyond referring the jury back to the original instruction) because "when a jury makes explicit its

difficulties the trial court should clear them away with concrete accuracy." Bollenbach vs. United States, 326 U.S. at 612-13. The Eleventh Circuit's reasoning that (1) because the original instruction was sufficient when given, (2) it was therefore sufficient for all time and purposes and (3) there was thus no need for any supplemental instruction is in conflict with Bollenbach and justifies review on certiorari under Supreme Court Rule 17. Moreover, the conflict between the panel's decision and decisions from other circuits call for an exercise of this Court's supervision and review on certiorari so that the critical question of whether a jury must be instructed on who bears what burden of proof under an entrapment defense can be answered, thereby giving guidance in the

proliferating number of cases involving "reverse stings" in which law enforcement officers seek to sell contraband to individuals they meet after confidential informants have done their work, as in the instant case.

CONCLUSION

For the reasons stated in this petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JOEL KAPLAN, ESQUIRE
Attorney for Petitioner
WALTHER
28 West Flagler Street
Suite 400
Miami, Florida 33130
(305) 373-6634

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

EDWARD WALTHER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

UNITED STATES v. EDWARD WALTHER _____ F.2d 1721 (11th Cir. 1989)	A.1-53
ORDER ON REHEARING	A.54-55
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ENTRAPMENT DEFENSE INSTRUCTION	A.58-60

UNITED STATES of America,
Plaintiff-Appellee,

v.

Edward Alois **WALTHER** a/k/a "Eddie,"
John H. Woodruff, Marvin Walkenstein, John Paul Weger a/k/a "Butch,"
Defendants-Appellants.

No. 87-3631.

United States Court of Appeals,
Eleventh Circuit.

March 16, 1989.

Defendants were convicted of attempting to possess and of conspiring to possess approximately 2,900 pounds of marijuana with intent to distribute by the United States District Court for the Middle District of Florida, No. 87-11 Cr-T-10(C), Wm. Terrell Hodges, Chief Judge, and they appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) Government's conduct as regards reverse sting operation, in initiating

negotiations for sale of drug and supplying drug and warehouse for sale, was not so "outrageous" as to violate defendants' due process rights; (2) evidence that narcotics defendants' prior acts of misconduct, including arrest more than ten years earlier for possession of marijuana, was admissible to show criminal predisposition needed to rebut entrapment defense; and (3) allowing government witnesses to explain why confidential government informant was not depicted in videotapes of narcotics transaction was not "plain error."

Affirmed.

1. Constitutional Law - 257.5

Criminal Law - 36.5

Government's conduct as regards reverse sting operation, in initiating negotiations for sale of drugs and

supplying drugs and warehouse for sale, was not so "outrageous" as to violate defendant's due process rights. U.S.C.A. Const.Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law - 37(1), 913(1)

Requiring defendants to admit to criminal acts in order to present entrapment defense did not violate defendants' constitutional rights or require that they be granted new trial.

3. Criminal Law - 703

Prosecutor's opening statement in narcotics prosecution, in which he described jury as conscience of community and demanded a guilty verdict, was not improper.

4. Criminal Law - 713

Test for determining existence of

prosecutorial misconduct is whether prosecutor's remarks were improper and prejudicially affected substantial rights of defendant.

5. Criminal Law - 863(2)

District court's refusal to give supplemental instruction when jurors exhibited confusion as to correct allocation of burden of proof in determining entrapment defense was not abuse of discretion, absent some error or impropriety in original instruction.

6. Criminal Law - 863(1)

Extent and character of supplemental instructions are within sound discretion of trial court.

7. Criminal Law - 369.2(7)

Evidence of narcotics defendants' prior acts of misconduct, including arrest more than ten years earlier for

possession of marijuana, was admissible to prove criminal predisposition needed to rebut allegation of entrapment.

8. Criminal Law - 1036.1(8)

Allowing government witnesses to explain why confidential government informant was not depicted in videotapes of drug sale was not "plain error," notwithstanding alleged prejudicial effect of suggesting that defendants were threat to informant and prone to violence. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

9. Criminal Law - 1043(1)

Court of Appeals must apply plain error rule when party states inaccurate objection, just as when party states no objection at all. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

10. Criminal Law - 1030(1)

"Plain error," when examined in context of entire case, is error so obvious that failure to notice it would seriously affect fairness, integrity and public reputation of judicial proceedings. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON, HATCHETT and COX, Circuit Judges.

HATCHETT, Circuit Judge.

In this "reverse sting" marijuana distribution case, we affirm the convictions and judgments.

FACTS

On October 13, 1986, a confidential informant (CI) advised officers from the Polk County, Florida, Sheriff's Department that individuals from Miami, Florida, were interested in purchasing narcotics. During the next two weeks, the officers devised a plan whereby they would pose as marijuana traffickers with a ready supply of marijuana for immediate sale. In this type of undercover narcotics operation, known as a "reverse sting," undercover law enforcement officers pose as sellers of previously confiscated drugs, set up deals with would-be buyers under carefully controlled conditions, and arrest the purchasers following the sale.

The officers borrowed 3,000 pounds of marijuana from the United States Customs

Service and rented two sites, a warehouse-office in Auburndale, Florida, and a warehouse in Lakeland, Florida. The officers installed videotape equipment and hidden microphones in both locations and stored the marijuana in the Lakeland warehouse.

On October 27, 1986, undercover officer William Warnock met the CI and appellants Edward Alois Walther and John H. Woodruff at a shopping center. Warnock drove Walther, Woodruff and the CI to the Auburndale warehouse to meet undercover officer Jose Davila, who posed as the head of the narcotics trafficking organization. At the warehouse, Walther and Woodruff discussed purchasing 10,000 pounds of marijuana from Davila, but agreed to purchase only 3,000 pounds during the first transaction.

Davila dispatched Warnock to bring a sample bale of the marijuana to the Auburndale warehouse. While waiting for Warnock to return, Davila, Walther, and Woodruff discussed arrangements for removing the marijuana from its storage facility. Davila set the price at $315 per pound. After Warnock returned with a sample bale, Walther examined it by inserting his hand into the bale to test the marijuana for wetness. Upon removing a small quantity for inspection, he rolled a marijuana cigarette and smoked it.

Davila told Walther and Woodruff that he needed forty-eight hours to prepare for the sale. Davila gave Walther and Woodruff his beeper number and concluded the meeting. Warnock drove Walther, Woodruff and the CI back to the shopping

center.

On October 28, 1986, Woodruff telephoned Davila's beeper number from Miami, and Davila returned the call. Woodruff told Davila that he and Walther were flying to Orlando, Florida, and would arrive at 9:30 a.m. on October 29, 1986. Woodruff also stated that he had already dispatched several vehicles to Polk County. Davila told Woodruff that he and Warnock would meet them at the airport.

On October 29, 1986, Davila and Warnock drove to the Orlando airport and joined Walther and Woodruff for a breakfast meeting. Davila stated that the forty-eight hours needed to make proper arrangements had not expired and that his associate had not yet located a satisfactory warehouse for storing and

distributing the 3,000 pounds of marijuana. Walther told the officers that his flight bag contained enough money to buy 400 pounds of marijuana. Walther explained that they had a car in the airport parking area with out-of-state plates equipped with air shock absorbers capable of carrying a 300 or 400 pound load smoothly. Davila replied that he was not interested in selling only 400 pounds. He added that he would make arrangements for his driver, Warnock, to meet them on October 30, 1986, and take them to his office to complete their negotiations. Later that day, Woodruff notified Davila that he and Walther were staying in room 203A at the Howard Johnson motel. Davila told Woodruff that Warnock would meet them at noon on October 30, 1986.

On the morning of October 30, 1986, Warnock drove to the Howard Johnson motel and met Walther and Woodruff. Each entered a separate car: Walther drove a Ford; Woodruff drove a Chevrolet Caprice with a Missouri license plate. Walther and Woodruff followed Warnock on a circuitous route to the shopping center where they had met three days before. Walther and Woodruff entered Warnock's car and accompanied him to the Auburndale warehouse to meet Davila. The activities in the Auburndale warehouse were recorded.

Davila told Walther and Woodruff that the 3,000 pounds of marijuana had been delivered to a different warehouse. Woodruff stated that Walther had the purchase money. Walther indicated, however, that he did not have all the

money. Walther asked to examine the 3,000 pounds of marijuana and indicated that he and others would repack the marijuana and place 400 pounds in one of the cars parked at the shopping center. Woodruff advised Davila that he had to contact persons in Miami because the trucks were still in Miami, and they could repack the load while waiting for the trucks to arrive. When Woodruff asked whether the storage area had security problems, Davila responded that he knew of none. Davila directed undercover officer Frank Hart to drive Woodruff to the warehouse in Lakeland.

After Woodruff left, Walther noted that the sample bale had contained two brickshaped packages and asked whether the bales generally looked that way. When told that they did, Walther declared

that repackaging was necessary. When Woodruff returned, he praised the location of the Lakeland warehouse and reported that he had examined the marijuana.

The parties agreed that the repackaging activity could commence prior to payment as long as the money was delivered before the marijuana left the warehouse. Davila assigned Warnock to meet Walther at the Howard Johnson motel and bring him to the Auburndale warehouse after Walther had obtained all the money. At 3:30 p.m., Warnock drove Walther and Woodruff back to the shopping center where they had left their cars. Warnock agreed to meet them early the next morning.

At 8:15 p.m. that evening, Hart arrived at the Lakeland warehouse with

Walther, Woodruff, and appellants John Paul Weger and Marvin Walkenstein. Undercover officers Robert Kenney and Roy Annen were inside the warehouse, purporting to serve as guards. Earlier that day, Kenney had driven a truck containing almost 3,000 pounds of marijuana to the warehouse.

After introducing themselves as Eddie (Walther), Johnny (Woodruff), "Butch" (Weger), and Marvin (Walkenstein), the appellants set about repacking and weighing the marijuana. Appellants began by unloading a trash can, garbage bags, gloves, coveralls, duct tape, cutting knives, and other items. Weger issued directions to the other three appellants. They placed two trash bags, one inside the other, into the trash can. The first bale removed from the truck contained two

compressed bricks of marijuana wrapped in burlap and plastic. Appellants removed one brick and placed it in the trash can; then appellants twisted and secured the inside bag and the outer bag with duct tape. Appellants weighed the bag, numbered it, and recorded the weight on a piece of duct tape on the outer bag. Appellants repeated that process with each act of repackaging. In addition, appellants kept a running account of the number of bags and their weights, deducted the weight of the bags, and placed the bags containing wet marijuana aside.

For approximately one hour, all four appellants participated in the repackaging and weighing process. Then Walther and Weger drove off, leaving Woodruff and Walkenstein to complete the

repackaging, weighing, and recording. On four occasions while pausing from their work, Walkenstein smoked some of the marijuana.

At 6 a.m. on October 31, 1986, Warnock met Walther in the lobby of the Howard Johnson motel and followed him to room 203A. Walther emerged from the room with a heavy suitcase, and Warnock placed it in the trunk of his car. Walther carried a second suitcase and his flight bag. Warnock drove Walther to the Auburndale warehouse to meet Davila. In the warehouse, the suitcases and the flight bag were opened and Walther removed stacks of money totalling $949,840.

Woodruff and Walkenstein completed the repackaging early that morning. Hart took Woodruff to the Auburndale warehouse. Woodruff displayed his tally

sheets and announced that they had computed the net weight of the marijuana at 2,813 pounds, including 1,037 pounds of wet marijuana. Walther and Woodruff sought a reduction in the price for the wet marijuana because they did not want to pay for the added weight caused by the moisture. Davila accepted a price reduction to $290 per pound for the wet marijuana. Walther calculated the total price for 1,776 pounds of marijuana at $315 per pound and 1,037 pounds of wet marijuana at $290 per pound at $860,170. Woodruff stated that Walkenstein would drive off part of the load and then contact Weger who would arrive with the trucks to transport the remainder of the marijuana.

Woodruff returned to the Lakeland warehouse and placed approximately 400

pounds of marijuana in the trunk of the Caprice. Satisfied with its appearance, Walkenstein departed. Walther remained at the Auburndale warehouse to count the cash and make payment for the marijuana.

Walkenstein drove the Caprice only a short distance before officers stopped and arrested him. A search of the vehicle uncovered a purse containing a number of items, including a list of expenses incurred by Walkenstein from October 28 to October 31, 1986, and a boarding pass for a flight from San Francisco, California, to Kansas City, Missouri, on October 16, 1986. The officers seized fourteen bags of marijuana. Officers arrested Walther at the Auburndale warehouse and found a key for room 203A of the Howard Johnson motel on his person. Officers arrested

Woodruff at the Lakeland warehouse. Officers arrested Weger in a hotel room near the Howard Johnson motel in which Walther and Woodruff had stayed. In the room officers found a hotel bill in the name of Marvin Walther.

After checking the registration of the Caprice, officers learned that in January, 1986, the car had been sold by a dealer in Kansas City, Missouri, to someone who called himself "David Miller," and that "Miller" provided a fictitious address to the seller and to the titling authority.

PROCEDURAL HISTORY

The grand jury charged the appellants in a two-count indictment. Count I charged that the appellants attempted to possess approximately 2,900 pounds of marijuana with the intent to distribute,

in violation of 21 U.S.C., Sections 841(a)(1) and 846, and 18 U.S.C., Section 2. Count II charged that the appellants conspired to possess marijuana with the intent to distribute, in violation of 21 U.S.C., Sections 841(a)(1) and 846.

During the jury trial, neither Weger nor Walkenstein summoned any witnesses or took the stand to testify on their own behalf. Woodruff and Walther claimed entrapment and testified in support of their defense. The jury found the appellants guilty of attempting (Count I) and conspiracy (Count II) to possess marijuana with intent to distribute in violation of 21 U.S.C., Sections 841(a)(1) and 846 and 18 U.S.C., Section 2. The district court sentenced Walther, Woodruff, and Walkenstein to concurrent terms of imprisonment for ten

years and concurrent five-year terms of supervised release. The district court sentenced Weger to imprisonment for twelve years and a five-year supervised release period on each count, to run concurrently.

CONTENTIONS

Many of the appellants' contentions overlap. They contend that the government's deep involvement in securing large amounts of marijuana and offering it for sale violates due process because it constitutes outrageous and unconscionable government involvement in criminal activity. Appellants also contend that this court should apply Mathews v. United States, ___ U.S. ___, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) retroactively to this case. The government counters that the appellants'

case and Mathews v. United States are distinguishable and that Mathews v. United States is inapplicable. Appellants further contend that the district court erred in: (1) allowing the prosecutor's opening statement; (2) refusing to give supplemental instructions on the entrapment defense; (3) allowing prior criminal conduct to be elicited on cross-examination; and (4) allowing government witnesses to explain why the CI and undercover agents were not depicted on the videotapes and why copies of the videotapes were not distributed to defense counsel.

ISSUES

We consider the following issues on appeal:

(1) whether the government's reverse

sting operation constituted outrageous conduct which violates due process;

(2) whether Mathews v. United States, ___ U.S. ___, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) should be applied retroactively;

(3) whether the district court erred in allowing the prosecutor's opening statement;

(4) whether the district court erred in refusing to give supplemental instructions on the entrapment defense;

(5) whether the district court erred in allowing prior criminal conduct to be elicited during cross-examination; and

(6) whether the district court erred in allowing government witnesses to explain why the CI and the undercover agents were not depicted on the Auburndale videotapes and why multiple

copies of the videotapes were not distributed to the appellants' counsel.

DISCUSSION

I. The Reverse Sting

[1] Appellants contend that the government's conduct in regard to the reverse sting, i.e. initiating the negotiations, providing the location for the transaction, providing the transportation for the narcotics, and supplying the narcotics, was so outrageous and unconscionable that it violated their due process rights.

Although a conviction may be overturned where government involvement in criminal activities is so extensive that it may be characterized as outrageous, government involvement in criminal activities is constitutionally impermissible only where it violates

fundamental fairness and shocks the universal cause of justice. United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973); Owen v. Wainwright, 806 F.2d 1519, 1521 (11th Cir. 1986). Appellants must show extreme circumstances of outrageous government conduct to establish a due process violation. Challenges to the reverse sting method of police investigation have been rejected by this court on numerous occasions. Owen v. Wainwright, 806 F.2d 1522. See United States v. Savage, 701 F.2d 867, 869-70 (11th Cir. 1983); United States v. Gianni, 678 F.2d 956, 960 (11th Cir. 1982). When reviewed in light of the aforementioned precedent, the appellants' assertion of outrageous conduct in this case is meritless. The

investigation in this case neither violates fundamental fairness nor shocks the universal cause of justice. Accordingly, we hold that the government's activities did not constitute outrageous or constitutionally impermissible conduct.

II. Mathews v. United States

[2] Walther and Woodruff contend that we should retroactively apply the rule of Mathew v. United States, ___ U.S. ___, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) and order a new trial. They contend that they were forced to admit all of the criminal acts at their trial in order to pursue the entrapment defense, in contravention of the rule in Mathew v. United States. They predict that in a retrial, they would have the opportunity to refrain from those admissions, and

thereby increase the likelihood of receiving a jury verdict of not guilty.

The government contends that Mathew v. United States is distinguishable from this case, thereby negating the issue of its retroactive application.

Prior to Mathew v. United States, we did not permit a defendant who wished to assert an entrapment defense to rely on other defenses that conflicted with the claim of entrapment. Although the defendant could assert inconsistent defenses in other contexts, the unusual nature of the entrapment defense, which focuses on the defendant's predisposition, i.e., the state of mind prior to commission of the offense, justified the requirement. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

In Mathew v. United States, the Supreme Court held that even when the defendant denied one or more elements of the offense, the defendant is still entitled to an entrapment instruction whenever sufficient evidence exists from which a reasonable jury could find entrapment. The Mathews court noted that a valid entrapment defense had two related elements, government inducement of the crime and a lack of predisposition on the part of the defendant to engage in the criminal conduct. The Court explained that predisposition, the principal element in the defense of entrapment, focused upon whether the defendant was an unwary innocent person or instead an unwary criminal who readily availed himself of the opportunity to perpetuate the crime. The Mathews Court

noted that the question of entrapment is generally one for the jury, rather than for the court.

In this case, we need not determine whether Mathew v. United States should be applied retroactively because the facts of Mathews are distinguishable. In Mathews, the district court refused to instruct the jury on entrapment. The district court ruled that the entrapment defense was not available to Mathews because he would not admit all of the elements of the offense charged. Mathew v. United States 108 S.Ct. at 885-886. In this case, the district court gave an elaborate instruction on the entrapment defense:[1] Unlike the district court in

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[1] The instruction stated:

The defendant asserts that he was a victim of entrapment concerning the offense charged in the indictment. A person is 'entrapped' when he is induced or persuaded by law enforcement officers or their agents to commit a crime that he

Mathew v. United States, the district court here made the entrapment defense available to appellants. The jury decided that it was inapplicable. Accordingly, we need not apply the rule

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had no previous intent to commit; and the law as a matter of policy forbids his conviction in such a case.

However, there is no entrapment where a defendant is ready and willing to break the law and the government agents merely provide what appears to be a favorable opportunity for the defendant to commit the crime. For example, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to engage in an unlawful transaction with the defendant. So, a defendant would not be a victim of entrapment if you should find, beyond a reasonable doubt, that the defendant was ready, willing and able to commit the crime charged in the indictment whenever opportunity was afforded, and that government officers or their agents did no more than offer an opportunity.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the defendant had any intent to commit the crime except for inducement or persuasion on the part of some government officer or agent, then it is your duty to find the defendant not guilty.

retroactively.

III. Trial Error

Appellants also contend that the district court erred in: (1) allowing the prosecutor's opening statement; (2) refusing to give supplemental instructions on the entrapment defense; (3) allowing evidence of prior criminal conduct elicited during cross-examination; and (4) allowing government witnesses to explain why undercover agents were not depicted on the videotapes and why copies of the videotapes were not distributed to defense counsel.

A. Prosecutor's Opening Statement

[3] Appellants contend that the district court committed reversible error when it failed to restrain the prosecutor from using the opening statement to prejudice the minds of the jurors against

them.[2] Appellants argue that the

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[2] Appellants contest the following portion of the prosecutor's opening statement:

MR. SCHMIDT [Prosecutor]: Now, you jurors--all of you at the conclusion of this case will speak with a single voice--really represent the voice and conscience of our community. And when you render a decision in this case, after hearing and thinking about the testimony and exhibits, you will speak not just for yourself, but you will have the opportunity to speak for justice and the community.

It is very important to people of the United States that each of these defendants, Butch Weger, Edward Walther, John Woodruff, and Marvin Walkenstein--

MR. EDMUND [Defense Counsel]: Your Honor, if it please the court, we're getting into the area of argument.

THE COURT: All right. I'll sustain that objection. I think that's argumentative in tone, Mr. Schmidt.

MR. SCHMIDT: It is important to the government that everyone receive a fair trial, because it is in the last analysis that it is only in the courtrooms like this and in trials like this that the mandate of the people of the United States against drug dealing--

MR. ALCOTT [Defense Counsel]: Your Honor, on behalf of Mr. Woodruff I again object to the argument of counsel, that he is making.

THE COURT: I overrule that objection. I take it you are concluding your remarks, Mr. Schmidt?

MR. SCHMIDT: Yes, Judge Hodges.

prosecutor's opening statement poisoned the minds of the jury because he urged them, prior to the introduction of any evidence, to return a verdict of guilty, telling them that such a verdict would be the right verdict for the right reason.

The government contends that the prosecutor's opening statement contained no comments constituting reversible error. The government argues that the

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THE COURT: Go ahead.

MR. SCHMIDT: That the mandate of the people of the United States against drug dealing is finally enforced.

I will have the opportunity to speak with you again at the end of the case before you decide it in what is known as the closing statements. I will at that time ask you to return a verdict of guilty, finding each of the four defendants guilty as to both charges set forth in the indictment. I will then explain to you why it is important to the people of the United States that that be the right verdict for the right reasons. If you do that, you will have given all the defendants a fair trial and justice will have been done.

Thank you very much.

prosecutor offered no personal opinions of guilt, did not refer to matters outside the record, used no inflammatory language, and did not impinge upon appellants' right not to testify. Instead, the government argues that the prosecutor characterized the jury as reflecting the conscience of the community, and told them that at the end of the case he would ask for a guilty verdict and explain why it was important "that that be the right verdict for the right reasons." The government argues that no error exists because the abundance of evidence established the appellants' guilt; three weeks passed between the opening remarks and the beginning of jury deliberations; and the trial judge issued instructions that the lawyers' comments are not evidence at the

outset and at the close of the trial.

[4] The test for determining the existence of prosecutorial misconduct is whether the remarks were improper and prejudicially affected the substantial rights of the defendants. United States v. Lacayo, 758 F.2d 1559, 1565 (11th Cir. 1985); United States v. Zielie, 734 F.2d 1447, 1460 (11th Cir. 1984). We find that the prosecutor's remarks were neither improper nor prejudicial to the appellants' substantial rights.[3]

B. Supplemental Instruction on Entrapment Defense

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[3] As to the comments not objected to, we decline review under the plain error standard. See United States v. Sawyer, 799 F.2d 1494, 1507 (11th Cir. 1986)(in a case involving prosecutorial misconduct, the plain error rule should be used sparingly and invoked only when a review of the entire record convinces the court that "a miscarriage of justice would otherwise result").

[5] At the close of the trial, the district court instructed the jury pursuant to the Eleventh Circuit pattern jury instruction on the entrapment defense. During deliberations, the jury sent a question regarding the correct allocation of the burden of proof in determining the entrapment defense. Over the objections of defense counsel, the district court instructed the jury to review its original instructions. Appellants contend that the district court's failure to give a supplemental instruction on the entrapment defense constituted reversible error. Appellants argue that the district court erroneously referred the jury to the very instruction which confused it in the first instance.

The government argues that the

entrapment instructions given were accurate.

[6] The extent and character of supplemental instructions are within the sound discretion of the trial court. United States v. Parr, 716 F.2d 796, 808 (11th Cir. 1983). The appellants did not object to the original instructions. At oral argument, appellants admitted that the original instructions were proper. Merely having the jury reconsider the correct instruction cannot constitute error, nor an abuse of discretion. Accordingly, we hold that the district court did not err nor abuse its discretion in refusing to give a supplemental instruction on the entrapment defense.

C. Cross-Examination on Extrinsic Acts of Misconduct

1. Walther

Walther contends that the district court committed reversible error by permitting the government to improperly introduce into evidence, through his cross-examination, unsubstantiated allegations and innuendos of his involvement in prior criminal acts. Walther argues that the government attempted to diminish his credibility by insinuating that he had previously participated in narcotic activities with Woodruff and by asserting through innuendo his membership in the drug underworld.

2. Woodruff

Woodruff contends that the district court committed error in allowing the introduction into evidence of his alleged involvement in prior criminal acts.

Woodruff argues that the government may not "parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo." Huddleston v. United States, ___ U.S. ___, ___, 108, S.Ct. 1496, 1501, 99 L.Ed.2d 771, 782 (1988). Woodruff contends that a prosecutor must back up his allegations and innuendo employed during cross-examination with substantive evidence introduced on rebuttal. The failure to do so, he argues, runs afoul of Fed.R.Evid. 404(b).[4]

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[4] Fed.R.Evid. 404(b) states:
Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

3. Weger and Walkenstein

Weger and Walkenstein contend that the district court erred by failing to adequately instruct the jury not to consider evidence of prior criminal conduct against them raised during the cross-examination of Woodruff. Weger and Walkenstein contend that the district court's failure to give the requested cautionary instructions impacted on them. They contend that the district court's general instruction that the case of each defendant should be considered separately and individually, was not sufficient to cure the error.

Weger and Walkenstein assert that the cumulative effect of the repeated and systematic pattern of floating insinuations before the jury without ever establishing a basis in fact amounted to

gross prosecutorial misconduct which could not be regarded as harmless error. Weger further contends that the district court erred by admitting evidence of a prior offense which occurred more than ten years prior to trial. He asserts that the probative value of a 1976 arrest for possession of marijuana while he attended college in New Mexico, on the issue of his state of mind in Florida in 1986, is tenuous. Weger argues that the prosecutor's need to present a ten-year-old unrelated incident is minimal and that the failure to exclude this prior act impaired his right to a fair trial.[5]

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[5] We note that Weger's ten-year-old conviction, introduced as a rebuttal to the entrapment defense, is only an extrinsic act of misconduct. Weger concedes that his ten-year-old prior conviction, used to rebut his entrapment defense, should be analyzed under the rubric of Fed.R.Evid. 403 and 404(b), and not Fed.R.Evid. 609(b) ("[e]vidence of a conviction is not admissible if a period of more than ten years has elapsed since

4. The Government

[7] The government contends that the threshold infirmity in the appellants' claims arises from an almost total lack of objection at trial. The government asserts that the prosecutor had the right to impeach and to inquire into activities which demonstrated that appellants were experienced in drug trafficking. The government also argues that the extrinsic activities were proper subjects for cross-examination because the prosecutor possessed a good faith factual basis for the questions.

The government asserts that if it had been called upon to place the facts on

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the date of the conviction...unless the court determines...that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect").

the record it would have done so. However, no appellant made such a request. Having heard the prosecutor assert that a factual basis existed, the government notes that the appellants did not request the demonstration of a factual basis nor a contemporary cautionary instruction. Evidence of prior acts of misconduct is admissible as a matter of predisposition in rebuttal to an entrapment defense. The decision to allow the extrinsic act evidence was within the court's sound discretion.

The government contends that remoteness, in Weger's case, did not materially alter the balance between prejudice and probative value. The lapse of ten years between offenses was not enough to warrant exclusion on the basis

of Fed.R.Evid. 403 or 404(b).[6]

To determine whether the introduction of extrinsic offense evidence constitutes reversible error under Fed.R.Evid. 403 and 404(b), we must consider (1) whether the extrinsic offense evidence is relevant to an issue other than the defendant's character and (2) whether the evidence possesses probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Fed.R.Evid. 403. United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)(in banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Although the government normally

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[6] Fed.R.Evid. 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the prejudice, confusion of issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

may not introduce evidence of a defendant's disposition to engage in criminal activity, it may do so once a defendant submits evidence which raises the possibility that he was induced to commit the crime. United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981). The introduction of extrinsic offense evidence is a reliable method of proving the criminal predisposition needed to rebut the allegation of entrapment. United States v. Salisbury, 662 F.2d at 741.

The government offered the extrinsic evidence introduced in this case not to demonstrate bad character, but to show the predisposition necessary to rebut the appellants allegations of entrapment. The first prong of Beechum is thereby satisfied. Review of the evidence

reveals that the second prong of Beechum is also satisfied: the prejudicial nature of the evidence does not outweigh its probative value. The government's cross-examinations were designed to demonstrate the appellants' criminal predispositions in rebuttal to the entrapment defense. Further, the prejudicial nature of Weger's 1976 arrest for the possession of marijuana, introduced to prove Weger's criminal disposition, does not outweigh its probative value. Accordingly, we find no error in the introduction of evidence of extrinsic acts.

D. Explanation of Videotapes by Government Witnesses

[8] Walther coontends that the district court erred in allowing government witnesses to explain why the

CI and the undercover agents were not depicted on the videotapes of the events which occurred in the Auburndale warehouse and why multiple copies of the videotapes were not distributed to the appellants' counsel. Walther argues that the government insinuated that the appellants posed a threat to the CI, were prone to violence, and that the appellants' counsel would use the tapes unethically and illegally. Walther argues that the district court erred by failing to cure the prejudice caused by the government.

The government contends that its witnesses' explanations were not prejudicial. The government argues that the appellants challenged the testimony below on the grounds of relevance and hearsay, and that their present objection

based on prejudice is procedurally deficient. As it did at trial, the government argues on appeal that the testimony was relevant to explain why the CI and undercover agents were not observed in the videotapes despite their avowed presence at the warehouse. The government argues that the explanatory testimony was not elicited to prejudice the appellants.

[9] At trial, defense counsel objected to the government witnesses' testimony based on relevancy and hearsay. On appeal, Walther contends that the testimony is prejudicial. We may only review Walther's additional objection to the extent that the admission of this testimony rises to the level of plain error. Fed.R.Crim.P. 52(b); United States v,. Sorondo, 845 F.2d 945, 948

(11th Cir. 1988). We use the plain error rule to enforce the requirement that parties object to errors at trial in a timely manner so as to provide the trial judge an opportunity to avoid or correct any error, and thus avoid the costs of reversal. United States v. Sorondo, at 948-49. We must apply the plain error rule when a party states an inaccurate objection just as when a party states no objection at all. In both cases, the trial judge is denied a proper opportunity to correct or avoid the error. United States v. Sorondo, at 949.

[10] Plain error, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity and public reputation of judicial proceedings. United States v. Sorondo,

at 949; United States v. Russell, 703 F.2d 1243, 1248 (11th Cir. 1983). We are not persuaded by Walther's contention that this testimony was elicited to prejudice the appellants and the appellants' counsel in the minds of the jurors. In scrutinizing the transcript of the district court proceedings, we find that the district court committed no error, much less plain error, in allowing the government witnesses to explain why the CI and the undercover agents were not depicted in the Auburndale videotapes and why multiple copies of the videotapes were not distributed to the appellants' counsel.

CONCLUSION

In summary, we hold that: the reverse sting operation did not constitute outrageous government conduct; Mathews v. United States is distinguishable from this case, thereby negating retroactive application; the prosecutor's opening statements were neither improper nor prejudicial to the appellants' substantial rights; the district court properly refused to give a supplemental instruction on the entrapment defense; the district court did not err n allowing evidence of extrinsic acts of prior misconduct; and the district court did not err in allowing the government witnesses to explain why the CI and the undercover agents were not depicted on the Auburndale videotapes and why multiple copies of the videotapes were

not distributed to the appellants' counsel.

The judgments, as to all appellants, are affirmed.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

87-3631

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD WALTHER,

Defendant-Appellant.

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Appeal for the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 16, 1989, 11 Cir., 198__, ___ F.2d ___).
(May 15, 1989)

Before JOHNSON, HATCHETT and COX, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

The defendant asserts that he was victim of entrapment concerning the offense alleged in the indictment. A person is entrapped when he is induced or persuaded by law enforcement officers or their agents to commit a crime that he had no previous intent to commit. And the law, as a matter of policy, forbids his conviction in such a case.

However, there is no entrapment where a defendant is ready and willing to break the law and the government agents merely provide what appears to be a favorable opportunity for the defendant to commit the crime. For example, it is not entrapment for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to engage in an unlawful transaction with the defendant.

So a defendant would not be victim of entrapment if you should find beyond a reasonable doubt that the defendant was ready, willing, and able to commit the crime charged in the indictment whenever an opportunity was afforded and that government officers or their agents did no more than offer an opportunity.

On the other hand, if the evidence in the case leaves you with a reasonable doubt whether the defendant had any intent to commit the crime except for inducement or persuasion on the part of some government officer or agent, then it is your duty to find the defendant not guilty. Trial transcript, Volume 14, pages 136-137.

ENTRAPMENT

The defendant in this case, _____, is on trial for _____. You have heard evidence [e.g.: that government agents persuaded the defendant to sell the drugs and he had never previously sold drugs]. To consider that evidence, you need to understand a legal term that we call "entrapment." Even though _____ may have [sold the drugs], as charged by the government, if it was the result of entrapment then you must find him not guilty. Government agents entrapped _____ if three things occurred:

First, the idea for committing the crime came from the government agents and not from _____, the person accused of

the crime.

Second, the government agents then persuaded or talked _____ into committing the crime. Simply giving _____ the opportunity to commit the crime is not the same as persuading him to commit the crime.

And third, the defendant was not ready and willing to commit the crime before the government agents spoke with him. Consider all the facts when you decide whether the defendant would have been ready and willing to commit the crime without the actions of the government agents.

On the issue of entrapment, as on other issues, the government must convince you beyond reasonable doubt that the defendant was not entrapped by government agents. Federal Judicial

Center, Pattern Criminal Jury Instructions (1988).